



22 May 2009

The Hon Julia Gillard MP
Deputy Prime Minister
Parliament House
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Dear Deputy Prime Minister

Re. *Fast Food Industry – Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009*

We are writing to express our concern about the statements made by the Committee Majority about the fast food industry in the report arising from the inquiry into the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009*, and to express our strong opposition to Recommendation 16.

Ai Group has considerable involvement in the fast food industry. For example, Ai Group represented the industry in the award modernisation proceedings, including representing McDonald's Australia Ltd, Hungry Jacks Pty Ltd, Yum Restaurants Australia Pty Ltd (which incorporates KFC and Pizza Hut), Australian Fast Foods Pty Ltd (which includes Red Rooster and Chicken Treat), Collins Food Group (which operates KFC outlets and Sizzler Restaurants) and Eagle Boys Dial-A-Pizza Australia Pty Ltd. We have presented extensive submissions and evidence on behalf of the industry during the modernisation process.

The fast food industry employs over 250,000 people, a high proportion of which are young people who are particularly vulnerable to periods of unemployment in the current recession. A high proportion of the workers in the industry are award-dependent and therefore any increases in minimum wages and conditions would have a direct and substantial negative impact upon employers and employees in the industry.

Ai Group strongly supports the provisions of Schedule 6 – Modern Enterprise Awards, of the Bill. The provisions are fair and balanced.

The ACTU and Shop, Distributive and Allied Employees Association (SDA) submitted to the Senate Committee:

- that franchises should be removed from the definition of “enterprise award-based instrument” or, alternatively, only franchisees which are bound by an existing enterprise award should be permitted to be bound by a modern enterprise award; and
- that specific criteria should be included in the Bill compelling Fair Work Australia (FWA) to include in all modern enterprise awards terms and conditions of employment which are at least equal to those in the relevant modern industry award.

Ai Group strongly opposed these proposals both in oral submissions before the Committee and through written supplementary submissions.

We are concerned that the Committee Majority's views and recommendations, as expressed in its report, appear to reflect an acceptance of the SDA's views without sufficient evidence being placed before the Committee to enable a proper analysis to be made.

The SDA's submissions and evidence focussed entirely upon the fast food industry and its proposals ignore the fact that there are a very large number of enterprise awards and enterprise NAPSAs in Australia in numerous industries.

The SDA's proposals would result in the provisions of Schedule 6 becoming unworkable for employers in the fast food industry and other industries.

Termination of instruments

The concern expressed by the Committee Majority, that "employees could become locked into instruments that may have rates and terms lower than the modern award" until 31 December 2013, is unfounded. Such instruments are able to be terminated at any time after 1 January 2010 if an application is made to FWA and after a proper assessment is made of the instrument.

Franchise systems

The Committee Majority's concerns that the "bill definition of franchise may allow employers who currently have no relationship to the franchise to gain the benefit of the modern enterprise award by moving to that franchise system" appears to be based upon a misunderstanding of how franchise systems operate. Employers, who are not party to the franchise system, would not be able to simply "move" to a franchise system.

The nature of the franchising system is to create a homogenous brand with commonalities in procedures and operations from one franchisee to the next. This creates an obvious benefit for the franchisor but also benefits existing franchisees through marketing, shared costs and brand awareness. It is a means by which many small businesses in Australia operate. The ability to grow a business of this type is largely through increasing the number of franchisees.

The Franchising Australia 2008 survey indicates that the growth rate of franchise systems from 2006 to 2008 was 14.6 percent.¹ Franchising is clearly a viable and growing business model, not just for the large players but for small businesses. The survey indicates that franchise systems represent 3.7% of all small businesses in Australia.

Franchise structures are not only prevalent within the fast food industry but can be found in many other industries, eg. retail chains, fitness centres, cleaning services and gardening businesses, to name a few.

Unfortunately the restrictions on award variations in the WorkChoices legislation do not allow franchises to be as homogenous as they often choose to be in respect of labour costs. This has resulted in the anomalous situation, whereby franchisees who

¹ *Franchising Australia 2008* survey sponsored by the Franchise Council of Australia.

happened to have commenced operations prior to commencement of an enterprise award, are covered by the award, whilst those that commenced operations later either as new franchisees or through transmission, are excluded from the enterprise award. Such outcomes are being imposed by the legislation and not through the choices of the parties.

Schedule 6 of the Bill enables such anomalies to be rectified and facilitates the maintenance of a modern workplace relations framework, allowing franchise businesses to grow.

The inclusion of franchise arrangements in Schedule 6 is consistent with the agreement making provisions of the *Fair Work Act*, in particular the “single interest employer” stream. (See s.247(2) of the Act).

Level playing field

The Committee Majority commented that “there should be a level playing field for employers and sees the potential for very large businesses to take advantage”. Other than the SDA’s submissions there was no evidence placed before the Committee to reach this conclusion.

The advantage that is purported to be gained by the large businesses is belied by the fact that the enterprise awards primarily apply to franchisees and not franchisors. These franchisees are often small employers.

In its submission, the SDA ignored its own role in the creation and maintenance of enterprise awards in the fast food industry. The enterprise awards in the industry contain different terms, some lower and some higher, than the industry awards / NAPSAs. Over the years, in its pursuit of award coverage for the fast food industry, the SDA has not sought to develop a “level playing field” as it now proposes. The SDA has recognised that different terms and conditions are appropriate for different enterprises / brands in the fast food industry.

Since the development of the National Fast Food Award, the SDA had not sought to include within the Award any of the franchisees not covered by their brand’s enterprise award.

Recommendation 16

It is essential that the Government reject Recommendation 16 of the Committee Majority.

Extension of enterprise awards to include additional franchisees

Any concerns that the ACTU, SDA or any other party have about extending enterprise awards to include additional franchisees are able to be pursued before FWA when applications are made to modernise relevant enterprise awards.

The criteria against which enterprise awards are assessed

The criteria in Item 4, paragraph (5) and Item 6 of Schedule 6 of the Bill are balanced and appropriate.

A balanced approach is important because some employers strongly oppose the termination of their enterprise award, while others support termination. Some

enterprise awards have conditions which are more favourable for the employer than the relevant industry award and hence provide a competitive advantage, others have conditions which are less favourable for the employer than the industry award and accordingly result in a competitive disadvantage.

To cater for the different views and circumstances that may arise, any party to an enterprise award should have the right to argue for the retention or termination of an enterprise award and to argue for the level of conditions in the award to be maintained, or amended upwards or downwards during the modernisation process. The Bill provides for this.

Enterprise awards have passed the test of being a fair and appropriate safety net when they were made, not in comparison to some industry award, but in their own right. The modernisation of enterprise awards should not be subject to a mandatory No Disadvantage Test against an industry award.

The criteria in Schedule 6 require FWA to weigh-up all of the different interests and issues and to make a fair decision.

If the SDA has concerns about the fairness of any conditions in enterprise awards in the fast food industry then these concerns should be raised with FWA when applications are made to modernise them. Its proposed amendments to the legislation are clearly designed to pre-determine the outcome in the SDA's favour.

Amendment to Schedule 6 proposed by Ai Group

Whilst strongly opposing the SDA's proposed amendments, an amendment should be made to Item 4, paragraph (3) in Schedule 6 to enable applications to be made prior to the FW (safety net provisions) commencement day in exceptional circumstances. Such circumstances would include, for example, where an enterprise instrument applies to some but not all franchisees of the same franchisor and it is more appropriate for a modern enterprise award to apply to all franchisees, rather than the relevant modern industry award.

With the exception of this amendment, Ai Group urges the Government to maintain the provisions of Schedule 6 of the Bill.

We would be happy to provide any further information which you may require.

Yours sincerely



Heather Ridout
CHIEF EXECUTIVE